

Attachment 1 to Plaintiffs' Response to Microsoft's Motion for Stay

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

MICROSOFT CORPORATION,
Defendant.

Civil Action No. 98-1232 (TPJ)

STATE OF NEW YORK *ex rel.*
Attorney General ELIOT SPITZER, *et al.*,
Plaintiffs,

v.

MICROSOFT CORPORATION,
Defendant.

Civil Action No. 98-1233 (TPJ)

PLAINTIFFS' MOTION FOR CERTIFICATION OF DIRECT APPEAL TO THE SUPREME COURT UNDER 15 U.S.C. § 29

On June ___, 2000, Microsoft filed its notice of appeal from this Court's Final Judgment entered on June 7, 2000. The plaintiffs hereby move under the Expediting Act¹ for an order

¹The Expediting Act, 15 U.S.C. § 29(b), provides in part:

An appeal from a final judgment [in a civil case brought by the United States under the Sherman Act] shall lie directly to the Supreme Court, if, upon application of a party filed within fifteen days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice. Such order shall be filed within thirty days after the filing of a notice of appeal. When such an order is filed, the appeal and any cross appeal shall be docketed in the time and manner prescribed by the rules of the Supreme Court. The Supreme Court shall thereupon either (1) dispose of the appeal and any cross appeal in the same manner as any other direct appeal authorized by law, or (2) in its discretion, deny the direct appeal and remand the case to the court of

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certifying that "immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice." 15 U.S.C. § 29(b).

Whether this Court should enter such an order, a prerequisite to direct review by the Supreme Court under the Expediting Act, depends not on the significance of the particular legal issues presented, but rather on the importance of a prompt decision by the Supreme Court.

United States v. Western Electric Co., 1983-2 Trade Cases ¶65,596 at 68,971 (D.D.C. 1983).

Direct review is appropriate in exceptional cases "where the underlying antitrust judgment involves matters of great and general importance to the public interest because of their 'impact on the economic welfare of this nation.'" Id.; H.R. Rep. No. 93-1463, 93d Cong. 2d Sess. 14 (1974). This is such a case.²

The markets found by the Court to be the loci of Microsoft's illegal conduct -- operating systems for Intel-based personal computers and web browsers -- are global markets that affect hundreds of millions of consumers and businesses throughout the world. See Findings ¶¶ 199-201. Microsoft dominates the market for world-wide licensing of all Intel-compatible PC

appeals, which shall then have jurisdiction to hear and determine the same as if the appeal and any cross appeal therein had been docketed in the court of appeals in the first instance pursuant to subsection (a) of this section.

²The United States has asked for certification in only two other appeals since the 1974 Expediting Act amendment made direct appeals to the Supreme Court in government civil antitrust cases discretionary rather than mandatory. Those cases arose out of the AT&T divestiture, and both the United States, as appellee, and various appellants successfully moved the district court for certification of the cases for immediate appeal to the Supreme Court. See Western Electric Co., 1983-2 Trade Cases ¶65,596 at 68,971; United States v. Western Electric Co., 1982-83 Trade Cases ¶65,130 at 71,311 (D.D.C. 1982). See also, Maryland v. United States, 460 U.S. 1001 (1983); California v. United States, 464 U.S. 1013 (1983).

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operating systems, and the Court found that it engaged in practices that have seriously impeded competition and have had a substantial anticompetitive impact on innovation in the personal computer industry. *See* Findings ¶¶ 18, 35, 412; Conclusions at 4. The harm from Microsoft's illegal conduct has been, and until fully remedied, will be, pervasive. For example, the Court found that "[m]ost harmful of all is the message that Microsoft's actions have conveyed to every enterprise with the potential to innovate in the computer industry. Through its conduct toward Netscape, IBM, Compaq, Intel, and others, Microsoft has demonstrated that it will use its prodigious market power and immense profits to harm any firm that insists on pursuing initiatives that could intensify competition against one of Microsoft's core products. Microsoft's past success in hurting such companies and stifling innovation deters investment in technologies and businesses that exhibit the potential to threaten Microsoft. The ultimate result is that some innovations that would truly benefit consumers never occur for the sole reason that they do not coincide with Microsoft's self-interest." Findings ¶ 412.

This Court has concluded that the separation of Microsoft's Operating System and Applications Businesses, combined with various transitional injunctive provisions, is necessary to prevent the continuance or recurrence of Microsoft's illegal activities and to restore the competitive conditions injured by those activities. The Final Judgment provides, however, that implementation of the divestiture will be stayed pending disposition of Microsoft's appeal. *See* Final Judgment §6.a. Prompt resolution of issues raised by the appeal both of the appropriateness of the Court's remedy order and of Microsoft's liability under the Sherman Act is plainly of great "importance to the public interest because of their impact on the economic welfare" of the country

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and the global economy. See Western Electric, 1983-2 Trade Cases ¶65,696 at 68,971.

In particular, prolonged uncertainty about the divestiture which could be engendered by a lengthy appeals process would have significant adverse consequences. If the remedy of divestiture is affirmed on appeal, then it is important that the appeal be resolved quickly to effectuate that remedy and begin the process of restoring competitive conditions in the affected markets.³ As the evidence in this case has demonstrated, in rapidly evolving technology markets, even a brief delay in effectuating remedies that will reduce Microsoft's ability and incentive to engage in anticompetitive conduct will have a serious adverse impact on competition and innovation. Consumers should not have to wait too long for the benefits of competition to be restored. Even if, on the other hand, the Court's determination on remedy were not affirmed on appeal, the public interest would still be served by a prompt decision that would end uncertainty about the remedy facing Microsoft's employees, stockholders and firms in the technology industry and throughout the economy that do business with it.

In addition, as plaintiffs have argued in their opposition to Microsoft's Motion for Stay of the Final Judgment, it is essential that the injunctive conduct provisions of the Court's Final Judgment go into effect as soon as provided for thereby. These provisions are essential to restrain and prevent ongoing anticompetitive behavior by Microsoft and to begin to create the circumstances under which competitive conditions can be restored to this important sector of the nation's economy once the divestiture is implemented. Consequently, any stay of the conduct

³Because the divestiture will not be implemented until at least a year after the appeals of this matter are resolved, the need for rapid disposition of the appeal is particularly acute.

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provisions is not appropriate and would be harmful to the public interest. However, in the event that this or another court were to stay any portion of those provisions pending appeal, expedited appellate review would be appropriate for the additional reason that it would minimize delay in implementing the conduct remedies.

Moreover, direct Supreme Court review would be appropriate in order to facilitate expedited review of the liability issues. Microsoft has repeatedly said since the Court entered its Conclusions of Law on April 3, 2000, that it does not believe it has done anything wrong. Plaintiffs, by contrast, believe that the Court was clearly correct and was following well-established Supreme Court and Court of Appeals precedent in holding that a monopolist like Microsoft may not lawfully engage in conduct that excludes rivals, increases or maintains its monopoly power, and would be unprofitable but for those effects. In light of the importance of this case to the software industry and the software industry to the global economy, direct Supreme Court review is appropriate in order to expedite final resolution of the disagreement among the parties about the standards that should govern Microsoft's conduct.

This case is also in an appropriate posture for Supreme Court review. This Court has made extensive factual findings, and the appeal is likely to turn on legal issues that do not require extensive reexamination of the parties' factual contentions. The issues involve principally the standard for evaluating the lawfulness of a defendant's conduct under Section 2 of the Sherman Act and the question whether special rules are appropriate in matters of software design, as well as the appropriateness of the remedy the Court has ordered.

Direct appeal to the Supreme Court in the first instance would resolve this case more

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quickly than review by the Court of Appeals. The Court of Appeals would be unlikely to render a decision satisfactory to both sides, thus foreclosing the possibility that intermediate review will obviate further petitions to the Supreme Court. Given the importance of the case and its impact on the economy, it is likely that the Supreme Court would grant review.

For these reasons, the Court should enter an order certifying that immediate consideration of the appeal of this case by the Supreme Court is of general public importance in the administration of justice.

Dated: June ___, 2000

Respectfully submitted,

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